



JOHN WAIHEE  
GOVERNOR

**ROBERT A. MARKS**

ATTORNEY GENERAL

KATHLEEN A. CALLAGHAN  
DIRECTOR

PH. (808) 586-1400

FAX (808) 586-1412

STATE OF HAWAII  
DEPARTMENT OF THE ATTORNEY GENERAL  
OFFICE OF INFORMATION PRACTICES  
426 QUEEN STREET, ROOM 201  
HONOLULU, HAWAII 96813-2904

October 7, 1992

Honorable Kathleen N. A. Watanabe  
County Attorney  
County of Kauai  
4396 Rice Street, Suite 202  
Lihue, Hawaii 96766

Attention: Galen T. Nakamura  
Deputy County Attorney

Re: Disclosure of the Identity of a County Employee Who is  
the Subject of a Criminal Investigation

This is in reply to a letter to the Office of Information Practices ("OIP") from Deputy County Attorney Galen T. Nakamura, requesting an advisory opinion from the OIP concerning whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the county should publicly disclose, upon request, the name of a suspect in a criminal investigation when the suspect has not been arrested, charged, or indicted.

ISSUE PRESENTED

Whether, under the UIPA, the Kauai Police Department ("KPD") should, upon request, disclose the identity of a suspect currently being investigated for having committed a criminal offense, when that person has not been arrested, charged, or indicted for having committed the offense.

BRIEF ANSWER

The UIPA provides that an individual has a significant privacy interest in "[i]nformation identifiable as part of an investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation." Haw. Rev. Stat. § 92F-14(b)(2) (Supp. 1991). Court decisions under the federal Freedom of Information Act, 5 U.S.C. § 552 (1988) ("FOIA"), also indicate that an individual possesses a substantial privacy

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interest in information that identifies the individual as the target of a criminal law enforcement investigation.

Based upon an examination of federal court decisions under the FOIA, we believe that under the UIPA's public interest balancing test, section 92F-14(a), Hawaii Revised Statutes, an individual's significant personal privacy interest in information identifying the individual as a suspect in a criminal investigation is not outweighed by the public interest in disclosure.

Specifically, in the facts of this particular case, we conclude that, unless the KPD's disclosure of the suspect's identity is necessary to prosecute the violation or to continue the investigation, or unless for other reasons there is a greater public interest in disclosure, the KPD's disclosure of this information would "constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1991).

In contrast, once an individual has been arrested, charged, or indicted, we conclude that the disclosure of a suspect's identity would not constitute a clearly unwarranted invasion of personal privacy under the UIPA. Likewise, where the disclosure of a suspect's identity is necessary to continue a criminal investigation, to apprehend the suspect, or to prosecute the violation, we find that no clearly unwarranted invasion of personal privacy would result from disclosure. See Haw. Rev. Stat. § 92F-14(b)(2) (Supp. 1991).

Because no exceptional circumstances exist in the facts presented to the OIP in this case, and because disclosure is not, at this date, necessary to prosecute the violation or to continue the investigation, we conclude that the KPD should not disclose the suspect's name in order to avoid a clearly unwarranted invasion of that individual's privacy.

#### FACTS

Recently, while on duty, a Kauai County employee was involved in a traffic accident that resulted in a fatality. As a result of the fatality, the KPD is investigating whether the county employee committed any criminal offenses in connection with the traffic accident.

It is the policy of the KPD to not publicly disclose a criminal suspect's name, until such time that the suspect has been either arrested or charged with a criminal offense.

In his letter to the OIP requesting an advisory opinion, Deputy County Attorney Galen T. Nakamura stated that the County Attorney's Office is currently reviewing the KPD's policy, and requests an advisory opinion from the OIP concerning whether, under the UIPA, the name of the county employee currently being investigated for possible criminal violations should be publicly disclosed upon request.

### DISCUSSION

Under the UIPA, all government records must be made available for public inspection and copying, unless one of the exceptions set forth in section 92F-13, Hawaii Revised Statutes, permits an agency to withhold access to those records. See Haw. Rev. Stat. § 92F-11(b) (Supp. 1991) ("[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying").

Under section 92F-13(1), Hawaii Revised Statutes, agencies are not required to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." The UIPA further provides that "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. § 92F-14(a) (Supp. 1991).

Under this balancing test, "if a privacy interest is not 'significant,' a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 670 (1988). Indeed, the legislative history of the UIPA's privacy exception indicates that the exception only applies if an individual's privacy interest in a government record is "significant." See id. ("[o]nce a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure").

In section 92F-14(b), Hawaii Revised Statutes, the Legislature provided examples of information in which an individual is deemed to have a significant privacy interest. Subsection (b) of section 92F-14, Hawaii Revised Statutes, provides in pertinent part:

(b) The following are examples of information in which the individual has a significant privacy interest:

. . . .

- (2) Information identifiable as part of an investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation; . . . .

Haw. Rev. Stat. § 92F-14(b)(2) (Supp. 1991).

The above quoted provision was taken verbatim from section 3-102(b)(2) of the Uniform Information Practices Code ("Model Code"), adopted by the National Conference of Commissioners on Uniform State Laws, upon which the UIPA was modeled by the Legislature. The commentary to this Model Code section merely states that it "not only identif[ies] information possessing a significant privacy interest, but also identif[ies] closely related information which is outside the scope of the privacy interest." Model Code § 3-201 commentary at 24 (1981) (emphasis in original).

Moreover, federal court decisions under the federal Freedom of Information Act, 5 U.S.C. § 552 (1988) ("FOIA")<sup>1</sup> indicate that an agency's disclosure that a third party has been the subject of a criminal investigation is likely to constitute an unwarranted invasion of personal privacy. In Baez v. U.S. Dep't of Justice, 647 F.2d 1328 (D.C. Cir. 1980), the court held that the disclosure of the names of third persons who had been investigated by the F.B.I. would constitute an unwarranted invasion of privacy. The court stated:

We think that disclosure of these materials would constitute an unwarranted invasion of the privacy of those individuals involved. Although neither we nor the FBI can anticipate precisely what the reaction of each individual would be if it were revealed to the public that the individual had been the subject of an FBI investigation, we may surmise that many at least might be either embarrassed or experience some

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<sup>1</sup>The legislative history of section 92F-14(b), Hawaii Revised Statutes, states that "case law under the [federal FOIA] should be consulted for additional guidance." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988).

discomfort from the disclosure of this kind of personal information.

Baez, 647 F.2d at 1338.

Similarly, in Kiraly v. F.B.I., 728 F.2d 273 (6th Cir. 1984), the court held that the F.B.I. properly withheld the names of "people who were investigated for suspected criminal activity or who were otherwise mentioned therein, but were not indicted or tried." Like the court in the Baez case, the court in Kiraly, noted that the "[d]isclosure of such information could subject a person to embarrassment, harassment, and even physical danger." Kiraly, 728 F.2d at 277.

More recent federal appellate court decisions under the FOIA also support a finding that individuals suspected of criminal activity have substantial privacy interests implicated by the public disclosure of their names in connection with a criminal investigation. See Landano v. U.S. Dep't of Justice, 956 F.2d 422, 426 (3rd Cir. 1992) ("suspects . . . have privacy interests implicated by the release of their names in connection with a criminal investigation"); Nadler v. U.S. Department of Justice, 955 F.2d 1479, 1489 (11th Cir. 1992) ("the mention of a person's name in the context of a law enforcement investigation 'will engender comment and speculation and carries a stigmatizing connotation'"); Safecard Services, Inc. v. Securities and Exchange Commission, 926 F.2d 1197 (D.C. Cir. 1991) ("[t]here is little question that disclosing the identity of targets of law-enforcement investigations can subject those identified to embarrassment and potentially more serious reputational harm").

Balancing a criminal investigation suspect's significant privacy interest in the fact that they are being investigated for criminal activity against the public interest in disclosure under section 92F-14(a), Hawaii Revised Statutes, we have previously noted that the "public interest" in disclosure under the UIPA is the public interest in disclosure of "[o]fficial information that sheds light on an agency's performance of its statutory purpose," see OIP Opinion Letter No. 90-7 (Feb. 9, 1990), and in information which sheds light on the actions of government officials, see OIP Opinion Letter No. 90-17 (April 24, 1990).

While the fact that the person in this case being investigated for possible criminal charges is a public employee, and while the disclosure of this individual's name would to some degree reveal information about the action of a government official, we also observe that this person does not hold a managerial position, or a position with significant authority within an agency, such that there may be more than some public

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interest in the disclosure of the employees identity. See, e.g., Stern v. FBI, 737 F.2d 84, 94 (D.C. Cir. 1984). Court decisions under the FOIA indicate that the names of individuals that appear in criminal investigation files would virtually never be "very probative of an agency's behavior or performance." Safecard Services, 926 F.2d at 1205. Indeed, the court held that the disclosure of such information would serve a "significant" public interest only if "there is compelling evidence that the agency . . . is engaged in illegal activity." Id.

Based upon our examination of case law under the FOIA, and upon section 92F-14(b)(2), Hawaii Revised Statutes, we conclude that the disclosure of the fact that an individual has been the subject of a criminal investigation would generally constitute a clearly unwarranted invasion of personal privacy. Because there is no compelling evidence in the facts presented indicating that a government agency is engaged in illegal activity, and because it does not appear that disclosure is necessary to continue the investigation, we see no basis to find the existence of a public interest in disclosure that would outweigh the suspect's privacy interest.

However, we wish to note that: (1) once an agency has publicly confirmed the existence of such an investigation because disclosure of a suspect's identity is necessary to prosecute the violation or to continue the investigation; or (2) once an arrest has been made, or the suspect has been charged, there is little or no privacy interest implicated by the disclosure of the suspect's identity. See OIP Op. Ltr. No. 91-4 (March 25, 1991) (access to police arrest log is not a clearly unwarranted invasion of privacy).

Finally, it is possible that an agency's disclosure of the identity of an individual who is being investigated for alleged criminal offenses may result in the "frustration of a legitimate government function" in situations where the very fact of a criminal investigation's existence is as yet unknown to the suspect, and that such a disclosure "could reasonably be expected to interfere with enforcement proceedings."<sup>2</sup> However, such is not the case in the facts present here. Specifically, we are informed that the county employee is aware of the existence of this investigation.

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<sup>2</sup>See OIP Op. Ltr. No. 91-9 (July 18, 1991) for a discussion of the UIPA's protection of "[r]ecords or information compiled for law enforcement purposes" the disclosure of which could reasonably be expected to interfere with enforcement proceedings.

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CONCLUSION

We conclude that under the UIPA, an individual has a significant privacy interest in the fact that the individual is suspected of alleged criminal activity. In the absence of evidence that an agency has been engaged in illegal conduct, or other exceptional circumstances that would lead to the existence of a significant public interest in disclosure, an agency's disclosure that an individual is suspected of criminal activity would generally constitute a clearly unwarranted invasion of personal privacy.

Very truly yours,



Hugh R. Jones  
Staff Attorney

APPROVED

*Lynn J. Loo for*  
Kathleen A. Callaghan  
Director

HRJ:sc  
Watanabesp

